BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

Opinion of the Circuit Court for Macomb County granting defendants' motion to dismiss (141). Opinion of Supreme Court of the State of Michigan affirming decision embodied in opinion of Circuit Court for Macomb County (157), Vol. 306, p. 562, Michigan Reports.

II.

1. Date of judgment to be reviewed is October 11, 1943. Motion for rehearing denied November 29, 1943, without opinion order denying same (206).

2. The statutory provision believed to sustain jurisdiction of this court is Sec. 237(b) of the Judicial Code, U. S. C. A. Title 28, Sec. 344(b).

3. Cases believed to sustain jurisdiction.

Pittsburgh etc. R. R. Co. v. Long Island L. & T. Co., 172 U. S. 493;
Hansberry v. Lee, 311 U. S. 32;
Toucey v. N. Y. Life Ins. Co., 314 U. S. 118.

Immaterial under this section whether the federal claim is sustained or denied.

Virginia v. Imperial Coal Sales Co., 293 U. S. 15.

The time within which petitioner is entitled to file this petition is within three months after the order of the Michigan Supreme Court denying motion for rehearing.

Citizens Bank v. Opperman, 249 U. S. 448;
Andrews v. Virginian Ry. Co., 248 U. S. 272;
Department of Banking v. Pink, 317 U. S. 264.

III.

The recital of facts contained in the "Summary Statement of Matters Involved" in the accompanying petition for writ of certiorari, together with facts recited in the opinion of the Supreme Court of the State of Michigan (157), is a sufficient statement to serve this court in its consideration of this brief. Same are hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

The errors in the decision of the Supreme Court of the State of Michigan which are relied upon by petitioner in this case are set out in the statement of "Reasons Relied Upon for the Allowance of Writ" in the accompanying petition for writ of certiorari (p. 8 *supra*). Petitioner will rely upon and urge before this Court all errors therein assigned. Same are adopted and made part of this brief.

V.

ARGUMENT

Summary

We assume that the Acts of Congress relating to this court's jurisdiction, and the decisions cited in paragraph 2 hereof, need no exposition and that this court will be satisfied therefrom of its power to act. Reasons why it should act are summarized as follows:

1. A denial of justice to a substantial extent has been suffered by petitioner. Important questions in federal jurisprudence are involved, which ought to be settled.

2. There are substantial errors of a federal nature involved in the lower court's decision which can and ought to be reviewed by this court in the following respects:

(a) A federal court decree has been given a construction unwarranted by any language therein or the accompanying opinion, in that it has been treated as an adjudication of rights of parties not before the court.

(b) Even if the court which rendered such decree had expressly stated what the lower courts imply, it would have been powerless to do so.

(1) Statutes governing district courts and courts of appeal strictly limit methods of acquiring jurisdiction. There is no authority in such statutes which would warrant a decree disposing of any rights *in personam* or *in rem* of this petitioner, under the circumstances disclosed here.

(2) On the assumption that federal courts can, in spite of such statutory limitations, exercise jurisdiction over the rights of persons not before them when class suits are brought, the decree claimed to be *res judicata* was not rendered in such a class suit where it could have the effect claimed in the present proceeding.

(c) If the lower court's opinion can be interpreted as presenting another ground independent of *res judicata, i. e.,* that a decision would have to be ultimately rendered against petitioner on the ground of *stare decisis,* due process was denied by such summary dismissal in the absence of a challenge or hearing on the sufficiency of petitioner's pleading, or permission to support its pleading with proofs.

I.

THE QUESTIONS PRESENTED DESERVE CONSIDERATION

Assuming that a petition for certiorari should convince the court that there is a reasonable probability of denial of justice, and that important questions of federal jurisprudence are involved, we proceed first to show the importance of the case to petitioner.

It has a claim against the drain district based upon its solemn assurances contained in bonds issued in apparent good faith, and purchased for an adequate consideration and in the firm expectation that the promises contained therein would be performed. That claim, with interest for twelve years, now amounts to over $332,000.00. It is petitioner's duty to its members to enforce it, if possible.

Notwithstanding hints contained in the opinion below that the Michigan court will ultimately deny the claim, that cannot be known in advance. Petitioner has evidence which it believes will convince a court which can hear the controversy on its merits that every representation contained in the bonds as to proper performance of all conditions precedent occurred, and believes that former decisions of the Michigan Supreme Court as to the binding effect of such representation will be accepted. It recognizes that it must overcome the precedent established by the decision of the Circuit Court of Appeals and the arguments which will be made as to the sanction by this court of such decision by reason of its refusal to grant a writ of certiorari. Notwithstanding all this, it believes that the law and the facts are with it, and that any court which will grant it a fair hearing will be convinced of the justice of its claim. Although some similarly constructed improvements have been held illegal, an equal number have been considered legal

in the published reports. See *Royal Oak Drain District v. Keefe*, 87 Fed. (2) 786, and cases there cited, and *Detroit Trust Co. v. Dingman*, 291 Mich. 170. Many more have been held legal in unreported decisions of the Michigan Circuit Court. There is no reason so far as it can see why the principles declared in *Detroit Trust Co. v. Dingman (supra)* should not apply here. As to this court's denial of certiorari to review the decision of the Circuit Court of Appeals, this court has repeatedly stated that denial of certiorari is not equivalent to an affirmance.

From the standpoint of federal jurisprudence, the case involves some vitally important questions surrounding the main inquiry as to the power of a federal court, under the circumstances detailed here, to make a decree binding upon persons never brought before it, and given no opportunity to defend their claims, and who cannot be connected with the litigation by any known principle of privity or *res judicata*. Many of these questions have been discussed in leading authorities on federal practice,—*Street, Federal Equity Practice* (1909), Sec. 548; *Moore's Federal Practice Under the New Rules* (1938), pp. 2283-2301,—and by the lower federal courts,—*Central Mexican Light & Power Co. v. Munch*, 116 Fed. (2) 85; *Women's Catholic Order of Foresters v. Arlington*, 28 Fed. Supp. 663; *Shain v. Armour & Co.*, 40 Fed. Supp. 488; *Brooks v. Southern Dairies, Inc.*, 38 Fed. Supp. 588; *Hunter v. Southern Indemnity Underwriters, Inc.*, 47 Fed. Supp. 242. If the views there expressed are correct, then the decision of the Michigan court which is here attacked is erroneous. If they are mistaken, then they should be corrected.

1. Substantial Errors of the Lower Courts Reviewable Here.

(a) The Michigan courts should not have interpreted the decree of the Circuit Court of Appeals as extending its authority over this petitioner.

Although we disagree with opinion of the Court of Appeals, 119 Fed. (2) 157 (18), it is but just to note that nothing which it said in its opinion or decree (37) manifests any intent on its part to extend its jurisdiction to anyone not present in the litigation. Its decree merely says that the judgment which Keefe and his co-plaintiffs obtained in the District Court must be reversed, and that their bill must be dismissed. Not a word appears in it or the accompanying opinion suggestive of any purpose to bind any absent parties to its pronouncements. Presumably, from anything the court said, if this petitioner had sued in the Federal Court instead of in the State Court, it would have sustained its right to a hearing on the merits and be guided by the evidence presented and principles of law deemed applicable.

Before assuming that a court has exercised jurisdiction over persons not before it, reference should be made to its decree and opinion, and if they disclose no such intent, no inferences should be countenanced.

(b) Had the Circuit Court of Appeals attempted to pass upon petitioner's claims, it would have been powerless to do so.

A Federal Court of Appeals is but a reviewing court, powerless to do more than a District Court could do. The District Court can only exercise the jurisdiction assigned to it by the Acts of Congress. It has no power to acquire jurisdiction over persons against their consent, without

the service of process, and it cannot affect their interests in property in the absence of procedure set forth in Judicial Code 57, Sec. 118, Title 28, U. S. C. A.

A defendant who defeats a suit against him can claim no more for his judgment in relation to others who have like causes of action than if he had directly attempted to sue them and had not followed procedure to bring them before the court. The issuer of these bonds is in no better position because of its success in defeating Keefe and his co-plaintiffs than were the issuers of the bonds involved in *Brooklyn v. Insurance Co.*, 99 U. S. 362, 370, and *Pana v. Bowler*, 107 U. S. 529, 544. Those municipalities had support of a statutory procedure and had published notice demanding that holders of their bonds should come in and litigate them, yet this court had no difficulty in seeing that judgments obtained upon such procedure were lacking in due process and were inconclusive. What a municipality cannot do directly in suits against its bondholders, it cannot do indirectly.

The Michigan Supreme Court assumes that any court, even a Federal Court, whose powers are strictly limited by Acts of Congress, can dispense with notice to litigants in a true class suit which it regards as a proceeding *in rem*. Not being concerned in this case with what other courts may do, this case should be considered first from the standpoint of powers of Federal Courts as limited by the statutes which create them and define their jurisdiction. In the absence of voluntary submission to the court's jurisdiction, we deny that a Federal Court can in any way or under any condition adjudicate rights of parties not before them, but if the court accepts the view that certain class suits are to be excepted, we deny that the decree urged as *res judicata* was rendered in such a class suit as comes within the exception.

Authority is scarcely needed to prove that the expressed will of Congress as to how courts which it creates may acquire jurisdiction cannot be thwarted. These are rules of substance made for the protection of citizens which cannot be disregarded.

Hurn v. Oursler, 289 U. S. 338;
Robertson v. Railroad Labor Board, 268 U. S. 619;
U. S. v. Sherwood, 312 U. S. 584, 589, 590;
Toucey v. New York Life Ins. Co. (supra).

There is no statute which permits a Federal Court to acquire jurisdiction, in the absence of appearance, without the service of process within a designated territory, and thus render a personal judgment or decree which will have binding force. Congress could not enact such a law if it so desired. *Pennoyer v. Neff,* 95 U. S. 714. There is no statute which permits it to acquire jurisdiction over a thing so as to exert its authority thereon, without some form of notice or actual seizure. Sec. 57, Judicial Code, Sec. 518 U. S. C. A., provides an adequate procedure in all cases where a litigant desires to enforce some claim, or discharge a claim of absent parties in respect to property actually or potentially subject to the court's jurisdiction, and excludes all other methods of acquiring authority to make judgments and decrees with respect thereto. Notice in an adequate form is essential whether the action is *in personam, in rem* or *quasi in rem.*

Roller v. Holly, 176 U. S. 398;
Windsor v. McVeigh, 93 U. S. 274.

Without notice there is no opportunity to be heard, and hence lack of due process. Casual notice and the probability that a party might be permitted to intervene is insuf-

ficient. "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment therein will not affect his legal rights." *Chase National Bank v. Norwalk*, 291 U. S. 475.

The lower court disposed of this case on the theory that in some types of class suits notice to the parties whose rights are to be affected is unnecessary. On this basis it is argued that due process is or should be of no concern to a court if it finds before it some parties who may be relied upon to diligently and honestly assert rights or claims which those who are absent and who have been given no notice might be expected to make. Because rules have been promulgated by this court authorizing class suits, because it has written into its opinions expressions which apparently countenance the view that a judgment or decree in some types of class suits may be binding upon absent parties,

> *Smith v. Swormstedt*, 16 How. 288;
> *Hartford Life Ins. Co. v. Ibs*, 237 U. S. 662;
> *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356;
> *Hansberry v. Lee*, 311 U. S. 32;

it has assumed that in some circumstances the opportunity to appear and to contest is unnecessary. We doubt whether any reality exists to support this theory. Are courts so infallible, and may counsel representing one litigant be depended upon to be so skillful, intelligent and industrious as to guarantee that no injustice be done by an *ex parte* adjudication? The explanation contained in the lower court's opinion, quoting from a former opinion of the court, *American State Savings Bank v. American State Savings Bank, Trustee*, 288 Mich. 78, which in turn quotes from other authorities, seems to us to condemn the theory. It is said that in a representative suit "there can be little

danger that the interests of all will be properly protected and maintained." In other words, the prospect of a little injustice which may result is not a discouraging feature. True, injustice may occur even though the party whose rights are to be affected is given a hearing, but at least he has been given a hearing and an opportunity to convince the court. We submit that this court should condemn the theory that one can litigate for another and subject the latter to a binding judgment. The class suit theory has outlived its usefulness. It has been supplanted by the better practice involved in the procedure for constructive service, embodied in Sec. 57 Judicial Code, and similar statutes enacted in all of our states, which eliminate the condition which gave rise to the adoption of the class suit doctrine by English Courts of Chancery. There is now no situation which deprives the courts of this country, at least of the Federal Courts, of power to proceed with litigation because of absence of parties interested in the subject matter, if the methods prescribed in constructive service statutes are followed.

If the court disagrees with the foregoing, the question still remains as to whether the Keefe suit was the type of a class suit where the decree rendered by the Court of Appeals is binding upon absentees. The Michigan court properly recognized the fact that there are some types of class suits in which the decree could not bind absent parties. Moore in his treatise, pp. 2235 *et seq.*, has classified them into the true, hybrid and spurious types, and to some extent the classification has been judicially accepted. Probably the Keefe suit would fall within the classification of hybrid, meaning that it is a combination of both the true and spurious types. Street holds that a true class suit always relates to a fund or property in which numerous parties have interests which are joint or common, so that any litigation which attempts to deal with the fund or

property requires that all be before the court, *Street, Fed. Equity Practice*, Sec. 547, and that a spurious type deals with a personal liability. Moore partially agrees, saying that the true class suit "is one wherein, but for the class action device, the joinder of all persons would be essential. This would be in cases where the right sought to be enforced was joint, common or derivative" (p. 2236). Perhaps the difference in the two definitions is largely in the choice of language, for it is only in the case of a suit involving the disposition or protection of a fund or property, tangible or intangible, that the necessity could arise for compulsory joinder. Both writers agree, and are supported by judicial opinion, that only insofar as a class suit is of the true type has it been held that a judgment or decree would blind absentees. Where there are numerous persons with claims against a common defendant, and no necessity of joinder, it is a spurious type, which court rules or practice statutes may authorize to be brought, but the decree therein can only bind the actual parties and those in privity with them. Moore, pp. 2283 *et seq.*

The allegations of the bill (38) in the Keefe suit, and the prayers for relief, prove that for the most part it is of the spurious type. Having alleged the ownership of 132 bonds and the statutory regulations for their enforcement out of collections from the annual installments of the original assessments, to be supplemented if necessary by advancements from the County's general funds, and the existence of some moneys in the sinking fund, it prayed for a declaration that all of the bonds and assessments were valid and enforceable, and for mandatory injunctions directing the enforcement of the taxes and payments from the general county fund and the sinking fund. The only *res* involved which plaintiffs sought to have administered was the sinking fund and the uncollected assessments. The county officers occupied the position of trustees over this fund and

assessments for the benefit of all holders of bonds, and perhaps their rights were so joined together that all holders would be indispensable parties to any suit having for its object their administration. But in other respects there was no such necessity of joinder. Each holder of bonds could proceed or not, as he wished, independent of all other holders, for a judgment for moneys due, for declaratory relief obligating the defendants to recognize his bonds as valid, or for orders directing payment from the general fund. *Regents v. Pray*, 264 Mich. 693; *Cowen v. Macomb County*, 290 Mich. 361. There was no such common interest in these rights requiring the joinder of all other bondholders. Each could proceed alone, and if it were not for permissive joinder, a modern innovation, each would be obliged to sue alone.

Theories of *res judicata* and *stare decisis* are confused in the opinion below, wherein it says that if any of the bonds were decreed valid they were all valid. What the court must mean is that it would be inconsistent for a court, acting on the same evidence and accepting the same principles of law, to hold some valid and others not. But that consideration does not establish the necessity of joinder. The absurdity of it is apparent when we see cities like New York and Philadelphia issuing a series of bonds in one issue that may run into enormous sums, all governed by the same statutory authority and the same acts of the municipal officers. It is ridiculous to suppose that one holder cannot sue on his bonds without making perhaps a hundred thousand other holders scattered throughout the world parties to his suit. Any time bonds are sought to be enforced in different tribunals, there is a chance of divergent views of the law and facts which will result in conflicting opinions as to validity. The decisions of this court are replete with instances where bonds were held valid in Federal Courts, but not in State Courts.

The court also advances the theory that the Keefe suit was an action *in rem,* but the definition on on which it relies, which is a fair statement of the concept of an action *in rem,* belies the application. Certainly Keefe and his co-plaintiffs were not suing a thing or property, but were suing persons, both natural and artificial, demanding that they perform or refrain from performing certain acts. To the extent that the demand relates to performance of acts with reference to the drain fund or the existing assessments, it might be termed an action *quasi in rem. Freeman v. Alderson,* 119 U. S. 185. But insofar as it demanded recognition of the validity of the bonds, their payment, and acts to be performed which would raise the money to pay them, it was a pure action *in personam.*

Only in the sense that every action on a municipal bond has for its remote object the imposition and collection of a tax lien, was this a suit to impress liens. Since municipalities can only pay their bonds by levying taxes, it does not follow that a suit for judgment upon the bonds, or mandamus to compel a tax levy, is anything other than an action *in personam.*

The lower court also overlooked the principle that in the absence of personal jurisdiction nothing decided in an action *in rem* or *quasi in rem* binds anyone, except the final conclusion reached that the thing over which jurisdiction is exercised shall be disposed of as the court directs. The points decided as a step in reach that conclusion may be litigated again, and bind only those over whom the court has personal jurisdiction. *Stewart v. Eaton,* 287 Mich. 466, cited by the court, is direct authority for this. "The judgment establishing the status of a person or a thing, or the title to property, is conclusive on everyone, but not so of the related findings of fact, no matter how necessary to the result * * * The effect on the *res* cannot be disputed, but to extend the finality of

the judgment to its inducing conclusions of fact, when the same facts are later at issue in a collateral action not affecting the *res*, would be to make the judgment *in rem* operate *in personam*." *State, ex rel. Gott v. Fidelity & D. Co.*, 317 Mo. 1078, 298 S. W. 83. A judgment cancelling a mortgage or other lien in a proceeding not based upon actual service, where the judgment rests on a finding that the debt secured has been paid, does not establish the fact of such payment in a collateral suit even between the same parties. It merely releases the land from the lien. *Combs v. Combs*, 249 Ky. 155, 60 S. W. (2) 368, 89 A. L. R. 1095; *Fitch v. Huntington*, 125 Wis. 204, 102 N. W. 1066.

What the lower court has done is directly contrary to this principle. It says in effect that by the decree of the Circuit Court of Appeals it was determined that the drain fund belonged absolutely either to the district or the county, and that all prior taxes levied for the drain were void. To do so it had to hold the bonds void. Treating the suit to subject the fund and assessments as an action *in rem*, and the decree disposing of the fund and assessments as binding upon the world, ergo, all determinations prior to and necessary to such decision also become binding upon the world.

We, therefore, submit that no matter from what angle the case is viewed, error has been committed in holding the Circuit Court of Appeals decree a bar to petitioner's suit.

(c) The Michigan Supreme Court should not have summarily dismissed petitioner's suit on the ground of stare decisis.

We are not sure that the Michigan Supreme Court in its reference to *stare decisis* meant to assert this as an independent ground for dismissing the suit or not. Lest the opinion be so interpreted, we will present our reasons

against such conclusion, and the point that it in itself is a violation of petitioner's right to due process. This turn of the case could not be anticipated before the opinion of the Michigan Supreme Court, and the first opportunity to complain was in the motion for rehearing, wherein petitioner pointed out the violation of the Fourteenth Amendment involved in the action taken (198). It must be noted that the Circuit Judge placed his decision solely on the ground of former adjudication (141).

The *stare decisis* argument is not asserted with respect to the court's conclusion that the suit is barred by former adjudication, for it is not claimed that the cases cited, *Clinton v. Spencer,* 250 Mich. 135, *Kinner v. Spencer,* 257 Mich. 142, etc., have anything to do with the subject of former adjudication. The court must mean that if the case were tried on the merits it would follow these decisions and hold that the improvement here involved is not a drain.

Stare decisis is not of itself a ground for dismissing any suit. It is not recognized in the Michigan Court Rule 18, under which the motion to dismiss is made. Attempting to arrive at the court's meaning, we can only suppose that it meant to say that if it considered the proofs it would arrive at the same conclusion as the Court of Appeals did. It says that the allegations in petitioner's bill, and those in the Keefe bill, are substantially the same. It must have known, however, that the Court of Appeals did not render its decision upon the sufficiency of the allegations in the Keefe bill, but upon the evidence which the parties submitted. There is no precedent to the effect that the allegations in this bill are insufficient; hence nothing to which the doctrine of *stare decisis* could apply, other than what the court may surmise will be the proofs in this case if it is tried.

No challenge to the sufficiency of the bill in this case was made by defendants. The trial court recognized the duty to accept it as true for the purpose of this motion, and we fail to see where the bill is in any way defective.

Granting that if defendants had, by demurrer or equivalent motion under Michigan practice, challenged the sufficiency of the bill, and the court had sustained the challenge, there would be no federal question, we say that a summary dismissal, with no attempt by the court or defendants to question the bill as a sufficient pleading, is a denial of due process. When a plaintiff institutes a suit and files his pleading, and no effective plea in bar is urged, either the pleading must be attacked as failing to state a cause of action, and plaintiff be heard on the question of its sufficiency, or the pleading must be answered and a hearing granted on the issues presented. A party is not given his day in court or accorded due process, who at the threshold of his case is in effect told by the court, "I will not hear your case because I anticipate that you cannot prove it to my satisfaction."

We, therefore, submit that the accompanying petition for certiorari ought to be granted.

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